# PART I: PROCEDURES

I PROCEDURES

## A. REPRESENTATION CASES: HOW AN EMPLOYEE ORGANIZATION BECOMES THE EXCLUSIVE REPRESENTATIVE OF A BARGAINING UNIT OF EMPLOYEES[1]

The Commission has prepared a *Representation Case Manual* (*R-Case Manual*) that covers the material in this summary in greater detail. The manual is available on the Commission's web site at www.mass.gov/lrc. Portions of the Code of Massachusetts Regulations (CMR) may be found in Part III, Rules & Regulations. For summaries of decisions concerning representation case procedures, *see* Part IV, Summary of Decisions, paragraph E.

### (1) Voluntary Recognition

M.G.L. c.150E, §4 authorizes public employers to recognize an employee organization designated by a majority of the employees in an appropriate bargaining unit as the exclusive representative of the employees in the unit for the purpose of collective bargaining. However, an employer may not voluntarily recognize an employee organization that does not represent a majority of the employees and may not interfere with employees' rights to freely select or reject an employee organization as their exclusive representative.

Although there are no specific procedures or requirements for voluntary recognition, if an employer and an employee organization comply with the requirements contained in 456 CMR 14.06(5), they may bar a rival employee organization's or a decertification petition within the first year after recognition to allow sufficient time to negotiate a first collective bargaining agreement. *See*, paragraph A(3)(e), below

If the public employer declines to voluntarily recognize the employee organization, the employee organization may file a representation petition with the Commission.

### (2) Filing A Representation Petition

*(a) Petitions by Employee Organizations*

The "petitioner" (the employee organization filing the petition) must file the petition on a form specified by the Commission. If the petitioner seeks to represent employees who are not currently represented by an employee organization, the form must be accompanied by proof in the form of a *showing of interest* (*see*, paragraph A(2)(b), below) that at least thirty percent (30%) of the employees covered by the petition have designated the

[1] Although many of the procedures for handling cases under M.G.L c.150A are identical to the procedures for handling cases under M.G.L. c.150E, there are differences. *See*, *e.g*. Part IV, Summary of Decisions, paragraph E(3)(2) (period during which a representation petition may be filed different); Part IV, Summary of Decisions, paragraph B(4) (certain professional employees excluded from definition of employee in M.G.L. c.150A, §2).

petitioner to act in their interest. *See*, 456 CMR 14.05(1). If the petitioner seeks to represent employees who are currently represented by an employee organization, the form must be accompanied by proof in the form of a *showing of interest* that at least fifty percent (50%) of the employees covered by the petition have designated the petitioner to act in their interest. *See*, 456 CMR 14.05(2).

> **There are specific times during which an employee organization may file a petition seeking to represent employees who are already represented by an employee organization. *See*, paragraph A(3), below, and 456 CMR 14.06; 456 CMR 14.17.**

For further information, *see R-Case Manual*, §1.2

*(b) Showing of Interest*

The proof that the required percentage of employees have designated the petitioner to act in their interest is called a *showing of interest* and must conform to the requirements contained in 456 CMR 11.05. Generally, petitioners submit either individual authorization cards or a sheet of paper with multiple lines for employees to indicate their authorization. However, regardless of the form, employees must individually sign and date the showing of interest within six (6) months of the filing of the petition. *See*, 456 CMR 11.05(1)-(2).

The Commission evaluates the showing of interest to determine whether there is enough interest among employees to justify the public expense of conducting an election. For information about the showing of interest required to intervene in a representation case, *see* 456 CMR 14.05(3).

The Commission may require the employer to submit a payroll or personnel list to assist in determining whether a sufficient showing of interest has been submitted. If any party challenges the sufficiency of the showing of interest submitted by any other party, the Commission will conduct an administrative investigation. However, the Commission's determination that a showing of interest either is or is not sufficient is not subject to further litigation or hearing, and the Commission does not disclose the identity of employees who sign a showing of interest. Following the completion of the case, the Commission returns any showing of interest to the petitioner or intervenor.

The Commission has found that the following language satisfies the showing of interest requirement when individually signed and dated by employees:

> **I [*employee name*], wish to be represented for the purposes of collective bargaining by [employee organization].**

or

**We, the undersigned, wish to be represented for the purposes of collective bargaining by [employee organization].**

An employee may sign a showing of interest for more than one employee organization and, if an election is held, may vote for any employee organization that appears on the ballot or may vote to be represented by no employee organization.

For further information, *see R-Case Manual*, §§1.4-1.5

*(c) Petitions by Employers*

If one or more employee organizations claim to represent a substantial number of employees, an employer may file a petition requesting the Commission to conduct an election to determine which of the competing employee organizations is the exclusive bargaining representative. *See*, 456 CMR 14.02. The petitioning employer must file the petition on a form specified by the Commission. An employer need not submit a showing of interest with its petition. In fact, employers are not permitted to ask employees whether they support one employee organization over another. However, the employer must submit a statement of the relevant facts on which the allegation of competing claims are based.

For further information, *see R-Case Manual*, §1.2.1

*(d) Decertification Petitions*

An employee or group of employees who no longer wish to be represented by an employee organization may file a petition to decertify the incumbent employee organization.

**A successful decertification election results in the employees no longer being represented by <u>any</u> employee organization. Employees who wish to be represented by a different employee organization should follow the procedures described in paragraph A(2), above.**

The petitioning employee(s) must file the petition on a form specified by the Commission, and must submit proof in the form of a *showing of interest* (*see*, paragraph A(2)(b), above) that at least fifty percent (50%) of the employees covered by the petition no longer wish to be represented by the incumbent employee organization. *See*, 456 CMR 11.05(2). A showing of interest in support of a decertification petition should indicate that the employees "no longer wish to be represented by [the incumbent employee organization]".

**There are specific times during which an employee or group of employees may file a petition seeking to decertify an incumbent employee organization. *See*, paragraph A(2), above, and 456 CMR 14.06; 456 CMR 14.17.**

The incumbent employee organization may intervene in the de-certification case and appear on the ballot. *See*, 456 CMR 14.18. The incumbent employee organization may also file a disclaimer of interest and/or, if the incumbent is the *certified* exclusive representative, a request for revocation of certification pursuant to 456 CMR 14.16. For additional information about certification and revocation of certification, *see* paragraphs A(8) and A(9), below.

For further information, *see R-Case Manual*, §1.2.3

**(3) When Petitions May be Filed**

To balance the sometimes competing interests of employee free choice and stable labor relations, the Commission has developed a set of rules concerning when certain representation petitions may be filed. Those rules are contained in 456 CMR 14.06 and are briefly summarized as follows:

*(a) Contract Bar*

To ensure that the parties to an existing collective bargaining agreement will have an opportunity to negotiate a successor agreement without undue disruption or interference, the Commission will not entertain a representation petition during the term of a valid collective bargaining agreement, unless the petition is filed no more than 180 days and no fewer than 150 days prior to the termination of the agreement. *See*, 456 CMR 14.06(a).[2]

*(b) Withdrawal/Disclaimer Bar*

To ensure stable labor relations, the Commission will not entertain a representation petition if the petitioner either withdrew a prior petition seeking to represent the petitioned-for employees or disclaimed interest in the petitioned-for employees within the preceding six (6) months.

*(c) Election-Year Bar*

To conserve agency resources, the Commission will not conduct an election as a result of any representation petition involving employees who were parties to an election during the preceding twelve (12) months.

[2] In cases arising under M.G.L. c.150A, the period during which a representation petition may be filed during the term of a valid collective bargaining agreement is no more than 90 days and no fewer than 60 days prior to the termination of the agreement. See, 456 CMR 2.04.

*(d) Certification-Year Bar*

To ensure stable labor relations, the Commission will not conduct an election as a result of any petition involving employees who are in a bargaining unit where an employee organization was *certified* as the exclusive representative within the preceding twelve (12) months. For additional information about certification, *see* paragraph A(8), below.

*(e) Recognition-Year Bar*

To ensure stable labor relations, the Commission will not conduct an election as a result of any representation petition where an employee organization was *recognized* as the exclusive representative of any of the employees involved within the preceding twelve (12) months, provided that the recognition was made in accordance with the following requirements:

1. The employer in good faith believes that the employee organization has been designated as the freely chosen representative of a majority of the employees in an appropriate bargaining unit;

2. The employer has conspicuously posted a notice on bulletin boards where notices to employees are normally posted for a period of at least twenty (20) consecutive days advising all persons that it intends to grant exclusive recognition without an election to a named employee organization in a specified bargaining unit;

   **If, with the twenty-day period, another employee organization claims to represent any of the employees involved and has filed a valid representation petition with the Commission, the employer may not recognize the employee organization.**

3. The recognition is in writing and specifically describes the bargaining unit involved; and

4. The employee organization is in compliance with the applicable filing requirements set forth in M.G.L. c. 150E, §§13 and 14.

For additional information about recognition, *see* paragraph A(1), above.

For further information, *see R-Case Manual*, §1.10

**(4) Conferences and Hearings**

When the Commission receives a representation petition, it will conduct a preliminary investigation to determine whether the petition is supported by the requisite showing of interest (*see*, paragraph A(2)(b), above) and that the petition otherwise raises a question of

representation in an appropriate bargaining unit. If the Commission determines that the petition raises a question of representation, the Commission will schedule an investigatory hearing and notify the petitioner, the employer, and any other party known to have an interest in the petition of the date, time, and location of the investigation. To ensure that all interested parties are aware of the pending petition and scheduled investigatory hearing, the employer is required to post the Commission's Notice of Hearing in a place readily accessible to the employees. *See*, 456 CMR 14.08(3)

Within thirty (30) days of the notice of hearing, any other employee organization, including the incumbent employee organization, may intervene in the proceeding. *See*, 456 CMR 14.18.

As part of its investigation, the Commission may require any party to submit information to assist the Commission in making its determination, including: the job titles of the petitioned-for employees, the job duties of any employee, the names of any other employee organizations that represent the employer's employees, and/or an organizational chart or information about the employer's management structure.

Prior to the scheduled hearing, a Commission agent may contact the parties to discuss a *consent election agreement* or to narrow the disputed issues. In rare cases, a Commission agent may schedule a pre-hearing conference to discuss any matter prior to the investigatory hearing. *See*, 456 CMR 14.08(4)(c)(5).

For further information, *see R-Case Manual*, §1.7-9

*(a) The Consent Agreement*

Pursuant to 456 CMR 14.11, the petitioner, employer, and any intervenor(s), may seek to waive the investigatory hearing and enter into a *consent election agreement.* As the term implies, the parties to a consent election agreement stipulate that the petitioned-for bargaining unit is appropriate and that there are no other substantive or procedural obstacles, and consent to an election involving the employees in the agreed-to bargaining unit. The Commission agent assigned to the case may assist the parties in negotiating a consent election agreement.

Any agreement that the petitioned-for bargaining unit is appropriate must be approved by the Commission. Pursuant to M.G.L. c.150E, §3, the Commission is required to determine whether the petitioned-for bargaining unit is an appropriate unit. To make that determination, the Commission may request certain information from the parties, including: the job titles of the petitioned-for employees, the job duties of any employee, the names of any other employee organizations that represent the employer's employees, and/or an organizational chart or information about the employer's management structure. If the Commission declines to approve a consent election agreement, the Commission agent will notify the parties and explain the reasons for the Commission's declination. The parties are

then free to re-negotiate a new consent election agreement based on the information provided by the Commission.

The appropriateness of a petitioned-for bargaining unit is a legal determination. For additional information about the criteria used to determine the appropriateness of a bargaining unit, *see* Part IV, Summary of Decisions, paragraph D.

If the Commission approves the parties' consent election agreement, the Commission will conduct a secret ballot election in accordance with 456 CMR 14.12. For more information about how the Commission conducts secret ballot elections, *see* paragraph A(5), below.

If the parties are unable or unwilling to enter into a consent election agreement, the Commission agent will conduct an investigatory hearing and the Commission will issue a decision.

For further information, *see R-Case Manual*, §1.13

*(b) The Investigatory Hearing and Decision*

The investigatory hearing is conducted by a Commission agent who will investigate the petition and gather any facts necessary to permit the Commission to decide any questions raised by the petition. Pursuant to 456 CMR 14.08(4)(c), the Commission agent will inquire fully into any disputed facts relevant to the issues raised by the petition and is not bound by the rules of evidence observed by the courts. Even if the parties are unable or unwilling to enter into a consent election agreement, the parties often submit joint stipulations of fact and/or joint exhibits. Submitting joint stipulations of fact and/or joint exhibits can significantly narrow the issues for hearing and save the parties considerable time and expense. Accordingly, the Commission agent will generally request that the parties attempt to agree to certain facts or offer certain documents that are not in dispute.

The Commission agent will often inquire into matters like: the job titles of the petitioned-for employees, the job duties of any employee, the names of any other employee organizations that represent the employer's employees, and/or an organizational chart or information about the employer's management structure. The Commission agent may also inquire into facts relevant to determine whether the Commission has jurisdiction or whether the petition and/or any election should or should not be barred for one of the reasons listed in 456 CMR 14.06. For more information about bars to election, *see* paragraph A(3), above.

Prior to any hearing a party may ask the Commission to issue a *subpoena* to compel the attendance of any witness at a hearing or a *subpoena duces tecum* to require a person to bring to the hearing particular documents that will be needed at the hearing. *See*, 456 CMR 13.12. At the hearing, parties may appear and represent themselves, or be represented by attorneys or other representatives, and may examine and cross-examine

witnesses, submit documentary evidence, and, with the permission of the Commission agent, either argue orally at the end of the hearing or may file a written brief after the hearing. After the hearing, the Commission will consider the evidence and arguments, and issue a written decision. Generally, the decision will either direct an election in a specified bargaining unit or dismiss the petition without an election.

For further information, *see R-Case Manual*, §1.14

**(5) Elections**

Whether the election comes as a result of a consent election agreement or a direction of election, the process of the election is the same. 456 CMR 14.12 contains the procedures for conducting secret ballot elections.

> **Due to the current resources, the Commission has decided to conduct all representation elections through the use of the Commission's mail-ballot election procedure. For detailed information about the Commission's mail-ballot election procedure, *see R-Case Manual*, §4.**

At the election, all parties (i.e. the petitioner, the employer, and any intervening employee organization(s) whose name appears on the ballot) are permitted to designate one official observer to assist the Commission agent(s) and to observe the conduct of the election.

For further information, *see R-Case Manual*, §§3-4

*(a) The Voter Eligibility List*

The Commission identifies the eligible voters from a list of employees' names and home addresses supplied by the employer. The list is often called the *Excelsior* list, after the National Labor Relations Board decision in *Excelsior Underwear, Inc*., 156 NLRB 1236, 61 LRRM 1217 (1966). The Commission will supply a copy of the voter eligibility list to all parties to the election and requires the employer to submit the list far enough in advance of the election to permit all parties to communicate with eligible voters. A Commission agent will work with the parties to ensure that the voter eligibility list is complete and accurate.

For further information, *see R-Case Manual*, §3.4

*(b) Challenged Ballots*

Any party, through its official observer, may challenge the eligibility of any prospective voter. *See*, 456 CMR 14.12(2). Generally, parties challenge the eligibility of a voter on the ground that the prospective voter is either a *managerial* or *confidential* employee or is otherwise excluded from the bargaining unit. To challenge a prospective voter, the observer should clearly state that the voter's eligibility is challenged and the

reason for the challenge (*e.g*. "The employer challenges the eligibility of this voter on the ground that she is a managerial employee"). The Commission agent will officially challenge the eligibility of any prospective voter whose name does not appear on the eligibility list.

The Commission agent will permit a challenged voter to vote, but will impound the ballot, by placing the ballot into a special envelope. The Commission agent will record the voter's name, job title, the challenging party, and reason for the challenge and deposit the ballot into the ballot box until the conclusion of the election.

At the conclusion of the election, the Commission agent may attempt to resolve any outstanding challenged ballots. If any challenged ballot is resolved in favor of the voter being eligible to vote, the Commission agent will open the challenged ballot envelope and, while preserving the secrecy of the vote, deposit the ballot into the ballot box prior to counting and tabulating the ballots. If the number of remaining challenged ballots is not sufficient to affect the outcome of the election (*i.e*., even if all the challenged ballots had been cast for the losing party, that party still would lose) the challenged ballots are never opened or counted, thereby preserving the secrecy of the challenged ballots.

If, however, the challenged ballots are sufficient to affect the outcome of the election, the Commission will investigate the eligibility of the challenged voter(s) by requesting evidence from the parties to the election. Generally, if the material facts concerning the voter's eligibility are undisputed, the Commission will issue a ruling on the eligibility of the challenged voter(s), and, with all appropriate safeguards to protect the secrecy of the voter(s), count the ballot(s) and add the totals to the previous tabulation to determine the final outcome. The Commission may also order an investigatory hearing, conducted pursuant to 456 CMR 13.00, on the challenged ballot(s) in order to resolve important disputed facts about the eligibility of the voter(s).

For further information, *see R-Case Manual*, §3.17

*(c) Counting and Tabulating the Results*

Following the conclusion of the voting, the Commission agent will count the ballots and prepare a tally of the results. As each ballot is counted, the Commission agent will display the ballot for the parties' official observers and "call" the vote, by announcing which of the choices on the ballot the voter selected, or, if the ballot is not properly marked, by announcing that the ballot is void. The tally will show the total number of votes cast, the number cast for no employee organization, the number cast for each employee organization whose name appeared on the ballot, the number of void ballots, and the number of challenged ballots.

For further information, *see R-Case Manual*, §3.22

*(d) Protested Ballots*

During the counting and tabulation process, any party, through its official observer, may object to the way the Commission agent calls a ballot. To protest the call of a ballot, the party should clearly state that he protests the call and the reasons for the protest. If the ballot call to which the party has protested will affect the outcome of the election, the protesting party may file Objections to the Conduct of the Election based upon the ballot call.

For further information, *see R-Case Manual*, §3.22.5

**(6) Objections to the Conduct of the Election**

Parties may file objections to the election within seven (7) days after the tally of the ballots has been furnished. Any objections filed must be accompanied by a short statement of the reasons for the objections and must be served on all parties. The Commission will investigate the objections and may require the parties to the election to submit evidence, including sworn affidavits, to support any factual allegations concerning the objections. Based on the evidence submitted, the Commission may decide the issues on the basis of undisputed facts, or conduct a hearing pursuant to 456 CMR 13.00, to resolve any disputed facts. If the Commission concludes that the objections warrant setting aside the result of the election, the Commission may re-run the election. If, however, the Commission concludes that the objections do not warrant overturning the election, the Commission will issue a Certification of the Results of the Election. *See*, paragraph A(8), below.

For further information, *see R-Case Manual*, §5.3

**(7) "Blocking" Charges**

If a party to the election believes that any other party to the election has engaged in a prohibited practice that would tend to interfere with the conduct of a valid election, the party may file a Motion to Block the Election, pursuant to 456 CMR 15.12. Any party seeking to block an election must submit evidence to establish that (1) there is probable cause to believe that the opposing party engaged in the conduct alleged; (2) the conduct alleged is a prohibited practice; and (3) the conduct may interfere with the employees' free choice in the election. Based on the information submitted by the parties, the Commission may postpone the election until the charge of prohibited practice is resolved. In some cases, the remedy in the prohibited practice case may be to extend the period during which the Commission will entertain no representation petition. Under those circumstances, the Commission may dismiss the pending representation petition.

For further information, *see R-Case Manual*, §1.12

**(8) Certification**

An employee organization "wins" a representation election by receiving a majority of the votes cast in the election (not simply the most votes). When an employee organization receives a majority of the votes cast in the election, the Commission certifies the employee organization as the exclusive collective bargaining representative in the bargaining unit. However, the Commission will not issue a certification until the employee organization has complied with M.G.L. c.150E, §§ 13 and 14 (which require that certain information be filed with the Commission). *See*, 456 CMR 14.12(4), 16.05.

**(9) Revocation Of Certification**

An employee organization that has previously been certified as the exclusive representative of a bargaining unit may request the Commission to revoke its certification. *See*, 456 CMR 14.16.

For further information, *see R-Case Manual*, §11

**(10) Clarification or Amendment (CAS) Petitions**

Only employee organizations and employers are permitted to file CAS petitions to ask the Commission to clarify or amend an existing bargaining unit (*i.e*. to add a job title to the unit or to remove a position from an existing unit). The petition must be on a form specified by the Commission.

After an employer or employee organization files a CAS petition, the case is assigned to a Commission agent for investigation. The purpose of the investigation is to gather sufficient information to determine if there is a dispute of material fact concerning the unit placement issue. The Commission agent typically initiates the investigation by holding an informal conference. Parties should come prepared to present oral and written (*e.g*., collective bargaining agreements, job descriptions, and organizational charts) information at the informal conference regarding the disputed position(s).

After the Commission agent has gathered the information provided by the parties, the Commission issues a show cause letter outlining the facts presented during the investigation. The parties then have an opportunity to identify any of the facts that are in dispute or in error by submitting written affidavits and any other information in support of their position to the Commission within a specified amount of time.

If the investigation reveals that there are disputes of material fact, the Commission will issue a Notice of Hearing to the parties. A Commission agent subsequently will conduct an investigatory hearing after which the Commission will issue a decision. If there are no disputes of material fact, the Commission will decide the unit placement issue on the facts gathered during the investigation.

For further information, *see R-Case Manual*, §8

## B. HOW THE COMMISSION HANDLES UNFAIR LABOR OR PROHIBITED PRACTICE CASES[3]

### (1) The Charge

Employees, employee organizations,[4] employers and their representatives can file a charge with the Commission alleging that an employee organization or employer has violated a specific section of M.G.L. c.150A or M.G.L. c.150E. The charge must be on a form specified by the Commission. Pursuant to 456 CMR 12.02, the party filing the charge (referred to as the *charging party*) must serve a copy of the charge and any attachments on the opposing party (referred to as the *respondent*). When the Commission receives a charge, the Commission will assign it a case number and issue a Notice that a Charge has been Docketed to all parties. The Notice has information and important filing deadlines concerning the Commission's investigation.

### (2) The Investigation

M.G.L. c.150E, §11 authorizes the Commission to conduct an investigation into any charge of prohibited practice. The Commission investigates charges through a *Written Investigation Procedure*. A copy of the Commission's *Written Investigation Procedure* is available on the Commission's web site at www.mass.gov/lrc.

During the investigation, the charging party has the burden to present information that establishes probable cause for the Commission to believe that the respondent has violated the Law, as claimed by the charging party. To meet that burden of proof, the charging party should submit written, sworn statements of fact (affidavits) from witnesses with personal knowledge of the facts and copies of all necessary documents (*e.g*. grievances, collective bargaining agreements, paystubs, letters) to establish the detailed facts that the charging party wants the Commission to consider. Although the facts that must be proven vary from case to case, the Commission has prepared *Guidelines for Submitting Written Evidence* that lists the facts necessary to prove the most common allegations. A copy of the Commission's *Guidelines for Submitting Written Evidence* is available on the Commission's web site at www.mass.gov/lrc. In its submission, the charging party should also explain why the facts presented violate the law. This legal argument should refer to prior cases decided by the Commission in similar situations. For a summary of selected decisions where the Commission has and has not found violations in certain circumstances, *see* Part IV, Summary of Decisions, paragraph F. Pursuant to 456 CMR 12.02, the charging party must serve a copy of its complete written submission, including

[3] Although M.G.L. c.150A refers to violations as "unfair labor practices" and M.G.L. c.150E refers to violations as "prohibited practices," the procedures for processing alleged violations of either law are identical. There are, however, differences in the *substance* of the two laws.

[4] M.G.L. c.150E refers to "labor organizations."

any affidavits, documents, and/or legal argument on the respondent and file a *certificate of service* with the Commission. Copies of blank certificate of service forms are available on the Commission's web site at www. mass.gov/lrc.

After the charging party has submitted its statement of facts and evidence and any legal argument, the respondent has an opportunity to file a written response. In its response, the respondent may refute the facts alleged by the charging party or disagree with the charging party's legal arguments. The respondent should attach affidavits from witnesses and relevant documents to support any factual statements. Pursuant to 456 CMR 12.02, the respondent must serve a copy of its complete written response, including any affidavits, documents, and/or legal argument on the charging party and file a *certificate of service* with the Commission.

After the charging party receives the respondent's response, the charging party may file with the Commission a further statement, supported by affidavits and/or documents as necessary, in order to explain, admit or deny the factual allegations contained in the respondent's response. Pursuant to 456 CMR 12.02, the charging party must serve a copy of any reply, including any affidavits, documents, and/or legal argument on the respondent and file a *certificate of service* with the Commission.

After all of the written investigation materials have been received, a panel of at least two Commissioners considers the case. Except in certain agency service fee cases,[5] the charging party has the burden to present sufficient evidence and legal argument to persuade the Commission that it has probable cause to believe that the respondent violated the law in the manner alleged by the charging party.

The most common circumstances under which the Commission will dismiss a charge without further hearing are the following: if necessary facts are missing from the submission; if the facts presented do not cause the Commission to believe that the Law has been violated; if the facts presented do not cause the Commission to believe that further proceedings would effectuate the purposes of the Law; or if the Commission concludes that the charging party has failed to make reasonable efforts to settle the matter. The Commission will issue a Complaint alleging that certain conduct violates the Law when the Commission has probable cause to believe that the alleged facts, if proven, would violate the Law. When the affidavits of the charging party's witnesses conflict with the affidavits of the respondent's witnesses, and the disputed facts, if proven, would violate the Law, the Commission usually will proceed to complaint.

[5] For more information about the burden of proof in agency service fee cases, see Part IV, Summary of Decisions, paragraph G.

However, bare allegations and unsupported general assertions will not satisfy a charging party's burden, particularly if the respondent has offered specific facts, supported by affidavits, to rebut the charging party's allegations.

Finally, the Commission has concluded that the purpose of the investigation process would not be best served by issuing subpoenas in connection with an investigation. As a result, the Commission generally does not issue its own subpoenas for investigations.

*(a) Dismissal of a Charge*

If the Commission dismisses a charge, a dismissal letter is sent to the parties informing them of the Commission's action.

(1) Request for Review

Within ten days of receipt of the dismissal letter, the charging party may write to the Commission following the procedures outlined in 456 CMR 15.04(3), and request that the Commission review its decision to dismiss the charge. In the request for review, the charging party should point to the specific information which the charging party contends warrants issuing a complaint; and should explain why the charging party believes a complaint should be issued. The respondent may write a letter to the Commission in response to the charging party's request for review within seven days.

(2) Commission Decision After Review

A panel of the Commissioners will consider the request for review and decide whether to issue a complaint or affirm the dismissal of the charge. If the dismissal is affirmed, the charging party may file an appeal of the dismissal with the Massachusetts Appeals Court, following procedures that are referenced in Part IV, Summary of Decisions, paragraph L.

*(b) If a Complaint is Issued*

When the Commission issues a complaint, it recites the facts and legal theories that give it probable cause to believe that the Law has been violated. If the charging party disagrees with the way that the complaint alleges the facts or the violation, the charging party should promptly call any discrepancies to the attention of the Commission by filing a motion to amend or clarify the complaint. The parties may also correct minor factual inaccuracies in the complaint by agreeing to joint stipulations of fact at the hearing.

Although the Commission issues the complaint in its own name, and must authorize all complaint allegations, the charging party is responsible for litigating the case. Similarly, when the Commission issues a complaint, it does so because there is probable cause to believe that the conduct alleged to have occurred could violate the Law or because no prior

case decides the same issues. The issuance of a complaint does not mean that the Commission has concluded that the Law has been violated.

*(c) Complaint Litigation*

(1) The Answer

After a complaint is authorized by the Commission, copies are sent by the Commission to the respondent and the charging party, as well as to any other interested parties. 456 CMR 15.06 requires the respondent to file an answer to the complaint within a specified time. The answer tells the charging party and the Commission which complaint allegations are disputed by the respondent.

(2) Motions for a Decision Without a Hearing

If either the respondent or the charging party believes that the pleadings (the complaint plus the answer) state undisputed facts sufficient to permit the Commission to make a decision in the case without a hearing, either party may request the Commission to issue a decision in the case without further hearing. Usually these motions (written statements of facts and law) are called either Motions for Summary Judgment or Motions for Judgment on the Pleadings. Any party who opposes such a motion may promptly write to the Commission arguing why the motion should not be granted.

(3) Prehearing Conferences

The Commission may schedule a conference prior to the hearing in order to explore settlement ideas and to encourage the parties to the hearing to agree to the introduction of documents, facts, or other evidence at the hearing. Sometimes this prehearing conference can be conducted by telephone. A party to the hearing may ask the hearing officer to schedule a prehearing conference.

(4) Stipulated Record

If the respondent and the charging party are able to agree to a statement of the material facts in the case, they may submit a written stipulation including all of the agreed upon facts and ask the Commission to issue a decision without a hearing. Each party may request permission to file a brief in the case to argue its position.

(5) The Hearing

456 CMR 13.00 explains the procedures which will be followed at a hearing. Prior to the hearing the parties may ask the Commission to issue subpoenas to compel the attendance of particular witnesses, or to compel someone to bring to the hearing particular documents. 456 CMR 13.12 governs this procedure. At the hearing, conducted by a Commission agent, the parties may represent themselves, or may be represented by

attorneys or others. Although the Commission hearing officer conducting the hearing will attempt to assist the parties by answering questions about the Commission's procedures, the hearing officer cannot act as the representative of a party, nor can the hearing officer give legal advice. The hearing officer is free, however, to ask questions of the parties and witnesses to clarify testimony, issues or positions.

The charging party will present its evidence first, by calling its witnesses and submitting any documentary evidence that it has to support the allegations in the complaint. The respondent has the opportunity to cross-examine the charging party's witnesses and to object to the introduction of evidence. An objection is stated at the time that a question is asked to protest the question as improper-- perhaps because it doesn't relate to the case or because it is unlikely to produce an accurate or reliable answer. Objections may also be stated to witness answers or to documents. Although the Commission is not required to follow the technical rules of evidence, evidence is usually most helpful if it is consistent with the rules of evidence. The hearing officer will rule on all objections at the hearing. Hearing officer rulings may be appealed to the Commissioners by following the interlocutory appeal procedure specified in 456 CMR 13.03.

After the charging party has presented its case, it rests (meaning that it has no further evidence to present). Then the respondent presents its evidence while the charging party has the opportunity to cross-examine the respondent's witnesses and to object to the respondent's introduction of evidence. When the respondent rests, the hearing officer may permit the charging party to introduce some rebuttal evidence (subject to the respondent's right to cross-examine or object) to refute specific points raised in the respondent's presentation.

The facts that must be proven to support or defend against the complaint depend upon the allegations contained in the complaint. Generally, any allegation that has been denied must be proven by the charging party. For a further discussion of the elements of different types of charges, *see* Part IV, Summary of Decisions, paragraph F.

The decision in a case will be based only upon evidence submitted at the hearing or through joint stipulations. Evidence previously submitted at the investigation is not part of the "record" at the hearing, but it can be resubmitted to the hearing officer with a request that it be considered.

At the conclusion of the presentation of evidence, the parties are entitled to argue orally in support of their position. Alternatively, the hearing officer may permit the parties to submit written briefs following the hearing. Either in oral argument, or in a written brief, each party should point to the evidence and to the court and Commission case decisions that support its position.

a) Hearings Designated for Hearing Officer Decision

If the Commission designates, or redesignates, a hearing as a hearing in which a hearing officer decision will issue in the first instance, the hearing officer who conducts the hearing also issues the decision in the case. If the hearing officer's decision is not appealed within ten (10) days, it becomes final and binding on the parties. Hearing officer decisions are not binding on the Commission and do not necessarily represent the law that the Commission will apply in other cases. The Commission, however, often adopts the reasoning of hearing officer decisions.

If the hearing officer's decision is appealed to the Commissioners following the procedures specified in 456 CMR 13.15, the Commission will review the hearing officer's decision and issue a decision on appeal. The Commission's decision can be appealed to the Appeals Court.

b) Hearings Designated for Commission Decision

If the Commission designates or redesignates a hearing as a hearing in which the Commission will issue a decision in the first instance, recommended findings will usually be issued first. The parties may then challenge the recommended findings before they are adopted by the Commission. The full procedure is described in 456 CMR 13.02(2). The Commission's final decision can also be appealed to the Appeals Court.

c) Compliance Proceedings

If the Commission or the hearing officer in an unappealed hearing officer decision orders the respondent to remedy the prohibited practice,[6] the respondent is responsible for informing the Commission of the steps that have been taken to comply with the remedial order. If a charging party claims that a respondent has not done everything that the decision ordered, the charging party should promptly notify the Commission in writing of any part of the order that has not been fulfilled and give the Commission evidence (such as affidavits from knowledgeable witnesses, or documents showing relevant facts) to support its contentions. The Commission will invite the respondent to tell the Commission how it has complied and will determine whether the respondent has failed to comply. If the respondent refuses to comply with the order, the Commission can institute enforcement proceedings in the Massachusetts Appeals Court. If, however, there is a dispute about what the order requires or about whether the respondent has complied, the Commission may order further proceedings at the Commission. 456 CMR 16.08 describes compliance procedures.

[6] The Commission may order remedies for unfair labor practices but has no authority to order punitive sanctions or attorneys' fees.

d) Appeals to Court

Any party dissatisfied with the Commission's decision in a case (either after a Commission Decision, or after a Commission Decision On Appeal of a Hearing Officer Decision) may file a notice of appeal within 30 days of the date of the decision with the Commission claiming a right to appeal the Commission's decision to the Massachusetts Appeals Court.

## C. STRIKE INVESTIGATIONS

Public employees may not strike or withhold their services, nor may public employees or their unions encourage or condone any public employee strike. The Law specifies that the employers shall file a Petition for a Strike Investigation whenever the employer believes that a public employee strike is occurring or about to occur. M.G.L. c.150E, §9A(b). There is no specific form for filing a Petition for a Strike Investigation. Rather, 456 CMR 16.03 explains the procedure for filing a Petition for a Strike Investigation.

Generally, when the Commission receives a petition for a strike investigation, the Commission promptly schedules an investigation. The employer will be given a copy of the Commission's Notice of Investigation, which tells the parties when and where the investigation will be held. The employer is responsible for serving copies of the notice upon any respondent named in the petition for a strike investigation.

At the investigation, the public employer bears the burden to prove that a public employee strike is occurring or about to occur. To meet this burden of proof, the employer may present witnesses or documentary evidence establishing that public employees are failing to perform required services. The public employees and the union alleged to be on strike may appear at the investigation and present witnesses or other evidence to explain their actions. Generally, if the public employees or the union do not appear at the investigation after having received notice of the time and place, the Commission will accept the employer's evidence as uncontested.

The Commission has concluded that the purpose of the strike investigation process would not be best served by issuing subpoenas in connection with the strike investigation. As a result, the Commission generally does not issue its own subpoenas for strike investigations.

If the Commission concludes that a strike is occurring or about to occur, it issues a written directive to the striking employees and/or their union setting requirements which must be met. In addition, if the strike continues, the Commission may begin proceedings in Superior Court. For a summary of some of the cases in which the Commission has considered whether a strike was occurring and a discussion of strike cases that have involved court proceedings, *see* Part IV, Summary of Decisions, paragraph J,

## D. REQUESTS FOR BINDING ARBITRATION

The Commission may order the parties to a written collective bargaining agreement to submit an unresolved grievance to grievance arbitration if the parties' collective bargaining agreement does not contain a final and binding arbitration procedure. See M.G.L. c.150E, §8. The request must be on a form specified by the Commission. The procedures for filing a request for binding arbitration are explained in 456 CMR 16.02. Such a request must be filed within sixty days of the date that the contractual grievance procedure, if any, has been exhausted.

## E. REQUESTS FOR ADVISORY OPINIONS

The Commission does not generally issue advisory opinions, instead it issues rulings in cases after investigation or hearing. The sole exception to this policy is the Commission's issuance of an advisory ruling to determine whether a bargaining proposal is a mandatory subject of bargaining within the meaning of M.G.L. c.150E, §6. 456 CMR 16.06 explains the procedure by which a party to collective bargaining negotiations can request such an advisory ruling whenever the other party to negotiations challenges the negotiability of a proposal.